

96TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } No. 96-1064

LEGISLATIVE CLERK
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DOCUMENTARY MATERIALS PRIVACY PROTECTION
ACT OF 1980

MAY 30, 1980.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

ADDITIONAL, DIFFERING, AND SUPPLEMENTAL
VIEWS

[To accompany H.R. 3486]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3486) to limit governmental search and seizure of materials possessed by persons involved in first amendment activities, to provide for a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of page and line numbers of the introduced bill) are as follows:

On the first page, line 3, strike out "First Amendment" and insert in lieu thereof "Documentary Materials".

On the first page, line 4, strike out "1979" and insert in lieu thereof "1980".

On page 5, after line 5, insert the following new section and renumber the subsequent sections accordingly:

SEARCHES OF INNOCENT THIRD PARTIES

SEC. 3. Notwithstanding any other law, it shall be unlawful for an officer or employee of the United States, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials possessed by a person, unless—

(a) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought; or

(b) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

(c) there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of the materials; or

(d) the materials have not been produced in response to a court order directing compliance with a subpoena duces tecum, and

(1) all appellate remedies have been exhausted;

or

(2) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.

In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

On page 7, line 20, change the period to a comma and add the following: "but does not mean contraband, the fruits of a crime, or things otherwise criminally possessed, or property designed or intended for use or which is or has been used as the means of committing a criminal offense."

On page 8, lines 1 and 2, strike out "instrumentalities of a crime" and insert in lieu thereof the following: "things otherwise criminally possessed, or property designed or intended for use or which is or has been used as the means of committing a criminal offense".

On page 5, strike the language beginning on line 15 through line 14 on page 7, and insert the following in lieu thereof:

SEC. 4. For violations of this Act by an officer or employee of the United States, there shall be a cause of action against the United States as provided by section 1346(b) and chapter 171 of title 28, United States Code. Remedies against the United States provided by this section shall be the exclusive remedy or sanction, including the Exclusionary Rule.

Amend the title so as to read: "A bill to limit governmental search and seizure of documentary materials possessed by persons, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes."

STATEMENT

Periodically, the Congress is called upon to consider issues which remind us of our special link to the revolutionary forefathers who preceded us.

This occurs when we exercise our duty to protect, through legislation, the basic values of the Constitution and Bill of Rights. Matters of constitutional interpretation have been a concern of the House of Representatives since the first Congress, in 1789. Sometimes a long-standing principle of constitutional jurisprudence is thrown into doubt by a decision of the Supreme Court which, while it may answer a narrow question based on specific facts, leaves government officials and members of the public in doubt as to how to interpret the law. When this occurs it is often best for Congress to step in to fill the void, rather than to await the results of many years of potential litigation which will again redefine the principle. This is the case with respect to the Documentary Materials Privacy Protection Act of 1980—legislation to redefine a portion of the law of search and seizure in response to the Supreme Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

Prior to the *Stanford Daily* case, the long established interpretation of the Fourth Amendment had held that a search warrant was considered to meet the constitutional ban on general searches only if the evidence sought constituted contraband, fruits or instrumentalities of a crime. This rule was modified in 1967 in the *Warden v. Hayden*, 387 U.S. 294 (1967), case to permit searches for mere evidence, but the facts of that case involved evidence obtained incidental to an arrest.

The specific facts of the *Stanford Daily* case involved a warrant, issued in April 1971 to search the offices of a university newspaper, the *Stanford Daily*. The purpose of the warrant was to locate and seize films and pictures which had been made by the newspaper's reporters while covering a campus demonstration the preceding day. At no time was it alleged that staff members of the newspaper were themselves suspected of criminal activity. Pursuant to the warrant, Palo Alto police officers searched the newsroom of the newspaper, examining many of its files, but they found no new evidence relating to events during the campus demonstration.

Soon after the search the *Stanford Daily* and members of its staff brought a civil action in United States District Court seeking declaratory and injunctive relief against the District Attorney, the Chief of Police and officers who conducted the search.

The Court denied the injunction but granted declaratory relief, holding that the Fourth and Fourteenth amendments forbid the issuance of a warrant to search for materials in possession of an innocent third party unless there is probable cause to believe that a subpoena duces tecum would be impracticable. Further, the Court noted that, where the object of the search is a newspaper, the First Amendment restrains the government's power to search even further.

The Ninth Circuit Court of Appeals upheld the District Court decision, adopting its opinion as its own. In so holding the Ninth Circuit opinion followed generally accepted Fourth Amendment law.

However, on further appeal the Supreme Court reversed the Ninth Circuit, and in so doing, swept away 200 years of jurisprudence greatly limiting searches directed against innocent third parties. The opinion of the Court, delivered by Mr. Justice White, set forth a new theory governing third party searches—identifying the standard to be

applied in issuing such warrants as one of "reasonableness." Further, while recognizing that any reasonableness requirement must be established with "scrupulous exactitude," where a newspaper was involved, the Court's opinion did not conclude that the First Amendment placed any additional restraints on such searches.

The public and Congressional response to the Supreme Court's decision was immediate. Newspaper editorials appeared all over the country condemning the Court's decision. And in Congress numerous members, of every ideological and political stripe, introduced remedial legislation. Meanwhile, the President ordered the Attorney General to study the issue and make a legislative recommendation to him. After consultation with constitutional scholars, civil libertarians, law enforcement authorities, and Cabinet officers, the President recommended H.R. 3486.

Subsequently, the subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary held five days of hearings on the issue. As introduced, the bill protected third parties from arbitrary searches only where First Amendment interests were involved. However, with the exception of the Department of Justice, not a single witness in favor of the legislation testified that the protections of the bill should be limited to the press alone. In fact, the representatives of media organizations were among the strongest proponents of expanding the legislation to protect all innocent third parties from arbitrary search and seizure. A great deal of apprehension was expressed about singling out the press for special treatment.

As a result, when the subcommittee met for markup it was generally agreed that the legislation should be extended to apply to all innocent third parties. However, because of the constitutional and policy implications of restricting the police powers of state and local authorities, the subcommittee decided to limit the applicability of the broad third party provisions of the bill to searches by federal officials only. Of course, the Committee would hope that state legislatures would follow suit, and indeed eight states have already enacted similar legislation. With respect to searches directed against persons preparing materials for broadcast or publication, the features of the Administration bill were retained—these apply to state and local as well as federal officials. The justification for the broader coverage when journalistic activity is involved is the historic obligation of the federal government to protect the free speech values of the First Amendment.

It is important to emphasize what this bill does and does not do. It does not prohibit lawful searches of third parties. It simply requires the use of a subpoena first to obtain documentary materials unless any one of five exceptions to the rule apply. First, if there is probable cause to believe that the person in possession of the materials has committed the offense then a normal search warrant could be used. Second, if there is reason to believe that the immediate seizure of the materials is necessary to prevent death or bodily injury then a search warrant could be used. Third, if there is reason to believe that the advance notice given with the subpoena would result in the destruction or concealment of the materials then a normal search warrant could be used. Fourth, if the subpoena process has been tried and the materials have not been produced and further delay would not be in the interests of justice then

a search warrant could be used. Fifth, it is important to note that contraband and fruits or instrumentalities of a crime are not protected in anyway. Only in the case where First Amendment as well as Fourth Amendment values are at stake is the restriction on a search taken further than the simple requirement of a subpoena—first where feasible. In the case of reporters and others preparing materials for publication, searches for actual “work product,” that is the personal notes and papers of the writer, are limited to situations in which there is probable cause to believe that the person searched has actually committed an offense for which the materials involved would constitute evidence.

H.R. 3486 is a reasonable bill. It consists largely of language drafted by law enforcement officials themselves. It enjoys the support of Members of all political persuasions, as shown by the fact that it was reported by a vote of 6 to 0 from the subcommittee and on a voice vote by the committee. In its amended form it is endorsed by groups such as the American Society of Newspaper Editors, the Radio Television News Directors Association, the American Newspaper Publishers Association, the American Medical Association, American Psychiatric Association, the American Civil Liberties Union and others.

SECTION-BY-SECTION ANALYSIS

Section 1. Title

H.R. 3486 is entitled the “Documentary Materials Privacy Protection Act of 1980.”

Section 2. Unlawful acts

Section 2 provides broad protections against searches for materials which are obtained or prepared in connection with First Amendment activities. This section describes the protected materials as those which are “possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication”. Thus, the protection provided by this section extends not only to the institutional press, but to academicians, authors, filmmakers, and free lance writers and photographers. While the Justice Department considered the option of a press-only bill, this format was rejected partially because of the extreme difficulties of arriving at a workable definition of the press, but more importantly because the First Amendment pursuits of others who are not members of the press establishment are equally as important and equally as susceptible to the chilling effect of governmental searches as are those of members of the news media.

Of course, not all documentary materials held by a reporter or author bear a relation to his First Amendment activities. Obviously excluded from the scope of the statute would be, among others, the business records of newspapers or authors or documents indicating ownership of property. This legislation protects only those materials which are held “in connection with a purpose to disseminate . . . a form of public communication”. This phrase, however, is intended to have a broad meaning. It reaches not only those materials which have been or are intended to be published or which contain information which has or will be incorporated in a form of public communication, but also those materials which were gathered and prepared in

anticipation of publication although that effort was later abandoned. Thus, a reporter's notes and drafts of an article which his editor later determines is unsuitable for publication would continue to be protected, as would an author's background research notes which are never incorporated into the final published product.

Materials which are held for purposes other than the dissemination of a form of public communication are not protected from search. Thus notes held by a corporate officer which were made in preparing a confidential memo that is later made public in an expose of corporate fraud would not be protected since the corporate officer did not intend that the contents of the report be published. Similarly, business records or reports which are required to be filed with the government, and which as a result are available for public examination, would not come within the scope of the provisions of this legislation because they were prepared for the purpose of meeting the reporting requirements, not for the purpose of communicating with the public. Although public access to such documents may be achieved, for example, through a request under the Freedom of Information Act, this does not transform those documents into a form of communication intended for the public.

Determining what constitutes a form of public communication was one of the more difficult problems which arose in developing this legislation. Obviously radio and television broadcasts, and most newspapers, magazines, and books are the clearest examples of forms of public communication. The internal memoranda of a corporation or its communications with its employees, on the other hand, would not be forms of public communication.

The fact that a small town newspaper or an esoteric magazine has a small circulation does not mean that it is not a form of public communication. The Committee intends that in borderline cases the appropriate test for ascertaining whether the communication in question is public or not is whether it would be available to persons in the general public upon simple request. Thus, a professional journal or a union newspaper which met this test would qualify as a form of public communication, while a book that was privately published for distribution only to the friends and relatives of the author would not. Other forms of public communication might include political campaign materials or a press conference.

This section provides comprehensive protections against searches by federal, state, and local officials in connection with the investigation or prosecution of any criminal offense. By covering law enforcement-related searches at all governmental levels, the bill would reach all of the previous situations in which searches of the media have been conducted.

Searches by private citizens are outside the scope of this legislation, just as they are outside the strictures of the Fourth Amendment. In addition, an assortment of noncriminal searches are not addressed in this bill. Unaffected by this legislation would be searches and seizures which arise out of civil matters such as the seizure of assets to satisfy the payment of a debt or taxes owed to a government unit and routine inspections by government agencies such as examinations of records of regulated businesses or authorized monitoring of the purity of food

and drugs. These types of searches are unlikely to involve the kinds of documentary materials protected by the bill.

Searches for materials which fall within the definition of work product are prohibited by this legislation with only two limited exceptions. The first of these two exceptions found at section 2(a)(1) allows a search for work product materials if there is probable cause to believe that the person possessing the materials has committed or is committing the crime for which the materials are sought. While this provision is cast in the form of an exception, it really codifies a core principle of this section, which is to protect from search only those persons involved in First Amendment activities who are themselves not implicated in the crime under investigation, and not to shield those who participate in crime.

The suspect exception has been carefully formulated to insure that it does not provide a means for circumventing the no-search rule. The standard of proof which must be met by officers seeking a search warrant under this exception is the same as that which would be required to obtain a warrant for the arrest of the person possessing the materials. A mere suspicion or reason to believe that the possessor is implicated in the crime is not a sufficient basis for invoking this exception. Proof of the complicity of the possessor of materials is not presently a prerequisite to obtaining a search warrant.

One further problem which arose in the Committee's consideration of the suspect exception was the possibility that a reporter who had received, for example, a stolen corporate report which discussed a defective product, knowing the report to be stolen, might be guilty of a crime of receipt or possession of stolen property and thus liable to search and seizure of the report under the suspect exception. The Committee believed that it would unduly broaden the suspect exception to use the reporter's crime of simple "possession" or "receipt" of the materials (or the similar secondary crimes of "withholding" or "communicating" the materials) as a vehicle for invoking the exception when the reporter himself had not participated in the commission of the crimes through which the materials were obtained. Thus the bill makes clear that crime of receipt or possession of materials generally may not be invoked to trigger the suspect exception.

The suspect exception is retained, however, in cases where the receipt, possession, or communication of materials constitutes an offense under the existing language espionage laws or related statutes concerning restricted data. Because the gravity of the offenses involved, the legal authority to search is retained where there is probable cause to believe that a violation of these federal laws has been committed. By relying on the present laws in this area rather than attempting to devise a new formulation, we have sought to avoid unnecessarily burdening the First Amendment search protection proposal with complex and difficult espionage issues. It is important to remember here that these offenses involve exclusively federal matters and that there is no past history of federal searches of the media based on these statutes or any other federal laws. These laws are:

- 18 U.S.C. 793 Gathering, transmitting or losing defense information.
- 18 U.S.C. 794 Gathering or delivering defense information to aid a foreign government.

- 18 U.S.C. 797 Publication and sale of photographs of defense installations.
- 18 U.S.C. 798 Disclosure of classified information by a government employee.
- 42 U.S.C. 2274 Communication of Atomic Energy data to aid a foreign government.
- 42 U.S.C. 2275 Receipt of restricted Atomic Energy data.
- 42 U.S.C. 2277 Disclosure of restricted Atomic Energy data by an employee of United States.
- 50 U.S.C. 783 Communication of classified information by government officer or employee.

The Committee recognizes that there is a legal controversy over the scope of one of these statutes, 18 U.S.C. 793. Some judicial opinions and some commentators on the law have suggested that this statute could apply where there is not intent to injure the United States or give advantage to a foreign power. Other opinions suggest that the statute, like all other espionage laws, requires an intent to injure the United States. Obviously, the Committee does not attempt to settle this controversy in this bill. However, to the extent that H.R. 3486 provides a suspect exception related to the national security statutes which are stated, it is the intent of the Committee that with regard to 18 U.S.C. 793 the suspect exception to the ban on searches would apply only if there was an allegation of an intent to injure the United States or give advantage to a foreign power. For the purposes of this Act the government shall recognize the higher standard, the requirement of intent, before utilizing the suspect exception for searches for materials sought under 18 U.S.C. 793.

The second circumstance in which a search for work product materials is permitted is that in which there is "reason to believe" that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being. In these instances, the preservation of human life must be the government's paramount concern.

The Committee believes that when human life is in peril, requiring that the proof of this danger meet the more stringent standard of probable cause is unjustifiable. These are exigent situations which do not allow extensive investigation prior to the seizure of materials that are reasonably believed to contain information that may relieve the peril by indicating the location of hostages or the identity of the criminals who threaten human life. Therefore, the "reason to believe" standard, which is higher than mere suspicion but which is considerably less demanding than "probable cause," is to be employed in invoking this life-in-danger exception.

Unless one of these two exceptions applies, law enforcement officers may not conduct a search for work product materials which are being held in connection with the dissemination of a form of public communication. Instead, these materials must be sought through the use of an informal request or a subpoena duces tecum. In the face of a refusal to comply with a subpoena, the sanction of contempt may be imposed by the court. But even if the penalties of civil or criminal contempt do not result in production of the materials, a search for these work product materials is nonetheless prohibited.

Under section 2 searches for non-work product documentary materials may be conducted in a broader range of circumstances than may searches for work product. In the case of these materials, the bill provides four exceptions to the general prohibition against search. The first two of these are identical to the suspect and life-in-danger exceptions which apply to work product.

In addition, a search may be permitted (if otherwise lawful) under a third exception if there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alternation or concealment of the materials being sought. Where non-work product materials are involved, the need to obtain and preserve evidence necessary to the successful investigation and prosecution of crime outweighs the need to avoid the disruptive effect of government searches where there is a demonstrated likelihood of destruction or concealment. This third exception might come into play, for example, where a reporter had in the past taken steps to obstruct an investigation or had announced that he would destroy the materials rather than turn them over to the police. In some instances, the fact of an extremely close, sympathetic relationship between the possessor of the materials and the suspect, or of a relationship in which the possessor was clearly dominated by the suspect, might suffice as a basis for invoking this exception. Similarly, a showing that the suspect had free access to the materials could constitute grounds for obtaining a warrant under this exception.

The fourth and final exception under which a search for non-work product may be conducted is that where non-compliance with a subpoena duces tecum, after a trial court has ordered production of the documents, threatens the interests of justice or where compliance is not forthcoming after all appeals have been exhausted. It is important to bear in mind that in no case will a search be permissible under this exception until such time as a trial court order directing compliance with the subpoena has failed to produce the materials sought. Even then, the possessor of the materials will be able to exhaust his appellate remedies before a search warrant may be obtained unless the government establishes that there is reason to believe that the delay in an investigation or trial occasioned by further proceedings concerning the subpoena would threaten the interests of justice. In the event that a search warrant is sought prior to the exhaustion of appellate remedies under this exception, the possessor of the materials must be given an adequate opportunity to submit an affidavit setting out the basis for any contention that the materials sought are not subject to seizure. Such contentions might include an assertion that there is not sufficient evidence to establish probable cause, or that the materials are in fact work product and thus not obtainable by search and seizure.

There are a number of situations in which the government might be successful in demonstrating that the delay attendant in awaiting final resolution of the appeal process would be likely to threaten the interests of justice. The most clearcut examples in which a search warrant might be obtained under this final exception prior to the exhaustion of appellate remedies would be difficulties in meeting the time constraints imposed by statutes of limitation, the Speedy Trial Act, or the expiration of grand juries. Other examples are situations in

which the success of an investigation or prosecution is likely to be jeopardized by the interruption occasioned by a lengthy appeal. Often the effectiveness of the criminal justice system hinges on swift action. Awaiting resolution of an appeal that may take months or even years may be intolerable from a law enforcement standpoint, e.g., in investigating such crimes as highly mobile drug trafficking or ongoing crimes which endanger the health and safety of the public, or where the ability to obtain a conviction through eyewitness identification diminishes rapidly with the passage of time.

Section 3. Searches of innocent third parties

This section provides the same protection against warrant searches afforded under the "other-than-work-product" provisions of Section 2 to documentary materials in the possession of persons who may not be involved in First Amendment activities, but who deserve similar protection of their privacy rights. This section would apply to documentary material possessed by lawyers, psychiatrists, medical doctors, clergy and all other persons, unless any one of the 4 exceptions to this "subpena first rule" applied.

The exceptions found in Section 3 are identical to the exceptions found in Section 2(b) which are analyzed above.

Section 4. Inapplicability of this act to searches and seizures conducted to enforce the customs laws of the United States

While routine border searches for the purpose of facilitating the collection of duties and taxes imposed on property imported into the United States and preventing the introduction of contraband into the United States would not, in the Committee's view, constitute searches conducted "in connection with the investigation or prosecution of crime", and as such would be outside the scope of this legislation, it seemed appropriate in this instance to clarify that these searches at the borders and international points of entry are not subject to the limitations of the bill. Since members of the press and authors frequently travel internationally, the Committee was concerned that they might misunderstand the application of this legislation and protest routine searches of their luggage and other property they were bringing into the United States. Therefore, routine border searches which are necessary to the enforcement of our customs laws are specifically exempted in section 4 of the bill from the restrictions of this legislation.

Section 5. Remedies

This section provides that, where searches or seizures of documentary materials by federal officials are alleged to be in violation of this act, the remedy is specifically made available under the Federal Tort Claims Act (FTCA). 28 U.S.C. section 2671 et seq. The FTCA currently provides for a remedy against the United States for alleged misconduct which is recognized as a tort in the state in which the injury occurred. This provision has been broadly interpreted by courts to allow recovery against the United States for tortious misconduct of its agents. See *Birnbaum v. United States*, 588 F. 2d 319 (2d Cir. 1978) (Implied tort of invasion of privacy for mailopening by CIA agents) *Spock v. United States*, 464 F. Supp. 510 (S.D. N.Y. 1978) (invasion of privacy by National Security Agency wiretaps); *Black*

v. *Sheraton Corp. of America*, 564 F. 2d 531 (D.C. Cir. 1977) (invasion of privacy and trespass by F.B.I. actionable under FTCA). In addition, 28 U.S.C. section 2680(h) was amended in 1974 to assure recovery for certain intentional torts committed by federal investigative or law enforcement officers, including abuse of process.

While the FTCA currently provides for a remedy against the United States, additional remedial features are currently under consideration by the Administrative Practice Subcommittee of this Committee. Those provisions include liquidated damages, waiver of good faith defense and a disciplinary mechanism supplement to immunizing individual law enforcement officers. The Committee anticipates that these further remedial measures will soon become available for victims of searches and seizures by federal officials found to be in violation of the provisions of this Act.

It must be noted here that the managers of H.R. 3486 have agreed to the provision of Section 5 with the understanding that the proposed improvement amendments to the FTCA will be enacted into law during this Congress. If such enactment does not appear likely, the managers reserve the right to support alteration of the remedies section by amendment.

With regard to violations by State or local officials of the provisions of Section 2 of this Act which protect those engaged in First Amendment activities, the Committee recognizes that 42 U.S.C. 1983 will provide a cause of action for the aggrieved person. Section 1983 provides a cause of action in Federal court for protection of rights, privileges of immunities secured by the "Constitution and Laws of the United States." The rights provided in Section 2 of this act shall be considered rights provided by the "laws of the United States."

Section 6. Definition

This section provides definition of three terms used in the bill.

"Documentary Materials"

The bill focuses its search limitations on "documentary materials." This term is given an expansive definition in order to cover all "materials upon which information is recorded." Specifically included within the definition of "documentary materials" are written or printed materials, films, tape recordings, and interview files.

Documentary materials were selected for protection for two reasons. First, it is searches for these sorts of materials that pose a significant danger to privacy rights. Such searches often necessitate examination of numerous irrelevant papers and files in order to locate those materials which pertain to the investigation in question. The import or nature of documentary materials, unlike nondocumentary items such as weapons or narcotics, is not apparent at first glance, but instead requires examination of their contents. While the scope of a search for nondocumentary materials may be effectively limited so as to exclude scrutiny of papers and files, searches for documentary materials are not susceptible to such limitations and, as a result, are likely to entail rummaging through files containing sensitive and confidential information which bears no relation to the criminal activity being investigated.

A second reason for restricting the application of this bill to searches for documentary materials is the fact that the purpose of such searches is generally to gain access to the information contained in these materials. To the extent that this information is generated through the investigative efforts of a reporter or researcher, it may be duplicated by a similar effort on the part of law enforcement officers. On the other hand, searches for non-documentary materials, such as contraband or property of the defendant which bear incriminating fingerprints or other physical evidence, arises out of a need to obtain these unique items which cannot be duplicated through further investigative effort. These nondocumentary materials should remain as permissible objects of lawful search and seizure.

"Work product"

The term "work-product" encompasses those materials whose very creation arises out of a desire to communicate to the public. What triggers the work-product no-search rule is the fact that the materials which are sought were created by or for a person in connection with his plans, or the plans of the person creating the materials, to communicate to the public. Thus, the notes and drafts of a reporter would be work product, as would be the photographs which were the subject of the search in the *Stanford Daily* case. Furthermore, a report revealing government corruption prepared by a "whistleblower" and sent to a newspaper in hopes that it will be published, would constitute work product even though the report was not solicited by the newspaper.

If plans to disseminate information to the public are formed at a time after the creation of the materials, the materials would not constitute work product. If, for example, a citizen is taking photographs when a crime suddenly occurs and later decides to sell the photographs for publication, his photographs would not qualify as work product since they were not created out of any desire that they be published in a form of public communication. However, similar photographs taken by a person on the staff of a newspaper assigned to cover the event at which the crime took place would meet the work product definition.

Contraband and the fruits and instrumentalities of a crime are excluded from the definition of work product. While it would be rare that such evidence would come within the work product definition since such materials are usually not created for the purpose of communicating with the public, one example of such evidence would be a ransom note—an instrumentality of the crime—which was sent by a kidnapper to a newspaper to broadcast his demands.

Since contraband and the fruits and instrumentalities of a crime, unlike work product materials generally, are intimately related to the commission of a crime and their production at trial is often necessary to securing convictions, these materials should not qualify for the stringent protections that the no-search rule affords to work product. If, however, such evidence is in documentary form, the protection of the non-work product provisions of the bill would be applicable. In

other words, all documentary materials which do not constitute work product but which are nonetheless held in connection with plans to disseminate a form of public communication are covered by the bill.

"Any other governmental unit"

As used in this Act, this term includes the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of State government.

OVERSIGHT STATEMENT

Oversight of the Department of Justice is the responsibility of the Committee on the Judiciary. The budget authorization process and the regular oversight activities of the Committee will permit substantive oversight of the Department's adherence to the requirements of H.R. 3486. No oversight statement has been received from the Committee on Government Operations regarding H.R. 3486.

NEW BUDGET AUTHORITY

In regard to clause 2(1) (3) (B) of rule XI of the House of Representatives, H.R. 3486 creates no new budget authority.

STATEMENT OF THE BUDGET COMMITTEE

No statement on H.R. 3486 has been received from the House Committee on the Budget.

ESTIMATED COST OF THE LEGISLATION

It is estimated that there will be no additional costs to the United States due to the provisions of H.R. 3486.

STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., April 25, 1980.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary, U.S. House of Representatives,
Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 3486, the Documentary Materials Privacy Protection Act of 1980, as ordered reported by the House Committee on the Judiciary, April 17, 1980.

The bill amends current law to make it unlawful for government officials to search for or seize materials possessed by news or publication organizations and innocent third parties. If enacted, this bill would require government agents to obtain subpoenas rather than

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search warrants for materials. The bill also provides various exceptions to the prohibition against surprise searches and seizures. Based on information from the Department of Justice and the Administrative Office of the United States Courts, it is estimated that there will be no significant additional cost as a result of these changes in procedure.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

INFLATION IMPACT STATEMENT

H.R. 3486 will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

COMMITTEE VOTE

H.R. 3486 was approved by the Committee on the Judiciary on April 17, 1980, by a voice vote.

ADDITIONAL VIEWS OF REPRESENTATIVE ROBERT F. DRINAN

In the Pentagon Papers litigation, where the Government sought to prevent The New York Times and The Washington Post from publishing those documents, the late Judge Gurfein wrote:

The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an unquitting press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.¹

H.R. 3486 is designed to enhance the values of liberty underlying the First and Fourth Amendments which protect the freedom of speech and press and the right to be free in one's home or business from unreasonable searches and seizures. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Supreme Court eroded those values in holding that police officials could use an ex parte warrant to search the premises of a newspaper for evidence of crime allegedly committed by persons having nothing to do with the operation of the paper.

Two days after the *Zurcher* decision, I introduced H.R. 12952 which would have overturned that ruling. On two major points, my bill was both broader and narrower than H.R. 3486. It was broader because it would have applied to State officials as well as federal agents. Congress has the authority, under Section 5 of the Fourteenth Amendment, to enforce against state officials the rights secured by Section 1 of that Amendment as defined either by the courts or by the Congress itself.² For example, in Title III of the Omnibus Crime Control and Safe Streets Act,³ Congress exercised that power by regulating state and federal wiretapping practices. It would have been preferable if H.R. 3486 covered state and local officials as well as federal employees. On the second point however, H.R. 3486 is broader than H.R. 12952. My earlier bill limited protection to news organizations, while H.R. 3486 includes other persons disseminating information to the public. On balance, H.R. 3486 is an excellent piece of legislation which merits strong support. Thus I join the majority report of the Committee without reservation, but add a few words regarding Section 5 of the bill.

¹ *United States v. The New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y.) aff'd, 403 U.S. 713 (1971) (per curiam).

² The Supreme Court has upheld the broad power of Congress under Section 5 to enforce 14th Amendment rights defined either by the courts, e.g., *Ex parte Virginia*, 100 U.S. 339 (1880) or by the Legislature. E.g., *Katzbach v. Morgan*, 384 U.S. 641 (1966). The *Morgan* case is particularly instructive because the Court sustained a provision of the Voting Rights Act of 1965 invalidating literacy tests in the face of an earlier Supreme Court decision holding that such tests do not violate the 14th Amendment. Compare *Lester v. Northampton County Election Board*, 360 U.S. 45 (1959).

³ 18 U.S.C. Sections 2510-2520.

Section 5 H.R. 3486 authorizes a damage remedy against the United States for persons who are injured or aggrieved by a violation of the statute. Because of the doctrine of sovereign immunity, it is necessary for Congress to waive it if damages against the Government are to be recovered. "A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *United States v. King*, 395 U.S. 1, 4 (1969)." *United States v. Mitchell*, 48 U.S.L.W. 4365, 4366 (U.S. April 15, 1980). Section 5 is intended as the express waiver by giving the aggrieved or injured person a remedy under the Federal Tort Claims Act. This provision makes it clear that the "[r]emedies against the United States provided by this section shall be exclusive of any other remedy or sanction, including the exclusionary rule."

Even though Section 5 provides the "exclusive" remedy against the United States, it should not be construed as the only remedy available to a person adversely affected or aggrieved by the unlawful conduct of federal agents. Such persons also have a private right of action against the federal officer or employee who committed the allegedly illegal act. These private claims for relief arise from two sources: (1) the Administrative Procedure Act (now codified largely in Chapters 5 and 7 of Title 5 USC); and (2) H.R. 3486 itself. Each source will be discussed in turn.

The Administrative Procedure Act (hereafter referred to as the APA) gives any person "adversely affected or aggrieved by agency action" a right to sue in court challenging that illegal conduct. 5 USC section 702. The APA creates a strong presumption of judicial review which may be rebutted only if it can be shown by clear and convincing evidence that Congress intended to preclude review. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Just last term the Supreme Court reaffirmed the availability of the APA as a basis for challenging a wide variety of adverse agency actions. See *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

It should be noted, however, that claims against federal officials under the APA extend only to actions "seeking relief other than money damages." 5 USC section 702. Nonetheless such suits, which may seek "declaratory judgments or writs of prohibitory or mandatory injunction" or other forms of "non-legal" relief, play an important role in controlling unlawful conduct by public officials. For example, if federal agents illegally seize materials from a newspaper or magazine which are about to be published, the person aggrieved or injured might wish to challenge the legality of such seizure through a suit for injunctive relief under the APA.⁴

In addition to the APA, a person adversely affected, aggrieved, or injured by a violation of H.R. 3486 may bring an action based directly on the proscriptions in the bill. Of course, Congress need not expressly give a private person a right of action so long as we make it clear in the legislative history that we so intend. At least since 1916, the Supreme Court has permitted private persons to bring suits impliedly based on rights inferred from federal statutes. *Texas & Pacific Railroad Co. v. Rigsby*, 241 U.S. 33 (1916). Only last term the Court authorized a female victim of alleged sex discrimination to institute litigation premised on rights implicitly found in Title IX of the Edu-

⁴ Seizure of property is, of course, "agency action" within the meaning of the APA. 5 U.S.C. Section 551 (10) (D) and (13).

cation Amendments of 1972. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

In the *Cannon* decision and in the earlier case of *Cort v. Ash*, 422 U.S., 66 (1975), the Supreme Court identified four factors which courts must evaluate to determine if a private right of action should be inferred from the federal statute. Recently, however, the Court appeared to move away from the four-factor analysis of the *Cort-Cannon* line of cases to the single factor of legislative intent. In *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 100 S. Ct. 242, 245 (1979), the Court held that "what must ultimately be determined is whether Congress intended to create the private remedy asserted." Thus it is important that Congress state, as we do here, our intention to authorize private persons to bring suits under this statute against federal officers or employees who engage in conduct made unlawful by this act.

The reasons for our authorizing private persons to sue the responsible federal officer or employee under H.R. 3486, apart from the remedies provided by the APA and the Tort Claims Act, are, obvious. The remedies presently available under the APA and the Tort Claims Act are not adequate, in all cases, to provide complete relief to the victim of unlawful conduct under H.R. 3486.

First, as noted earlier, monetary damages are not available at all under the APA. While a money judgment may be obtained against the United States under the Federal Tort Claims Act, punitive damages are barred by the statute. 28 U.S.C. section 2674. In addition a litigant is not entitled to a jury trial 28 U.S.C. section 2402, which may seriously impair the recovery of an adequate award of damages.

Second, there is some question whether the Federal Tort Claims Act, as presently written, would provide a damage remedy for violations of H.R. 3486. While the substantive coverage of the Act is keyed to state law, 28 U.S.C. section 1346(b), the Supreme Court has held that state created strict liability torts are not covered by the statute. *Laird v. Nelms* 406, U.S. 797 (1972). In addition the Act contains numerous exceptions, 28 U.S.C. section 2680 which the court has sometimes interpreted expansively. See *Dalehite v. United States*, 346, U.S. 15 (1953). Even the recent amendments to the Tort Claims Act covering certain "acts or omissions of investigative or law enforcement officers" extend only to claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. section 2680(h).

Third, it is important that particular officers or employees of the Government be aware that they may be directly liable for their unlawful conduct.⁵ If an action against the United States under the Tort Claims Act is the only remedy, federal employees may feel they can violate H.R. 3486 with impunity, knowing that the only damage remedy available lies against the Government.

A few weeks ago the Supreme Court reaffirmed the vitality of that point in *Carlson v. Green*, 48 U.S.L.W. 4421 (U.S. April 22, 1980), where it held that the mother of a deceased federal prisoner

⁵ To be sure, federal officers or employees, in such cases, would have a qualified immunity as a defense to such money claims if they acted on a good faith belief of the legality of their actions or without a malicious intent to deprive any person of a right under H.R. 3486. See *Butz v. Economou*, 434 U.S. 994 (1978).

has an implied claim for damages under the Eighth Amendment against federal prison officials. The Court rejected the Government's contention that the Tort Claims Act provides an adequate remedy.

Fourth, in some circumstances, the injured or aggrieved person may be suing for injunctive or other equitable relief. For example, a dispute with a particular newspaper or scholar may involve several pieces of evidence which the Government may wish to obtain. Thus federal agents may make several attempts to seize the allegedly probative evidence. In cases where the conduct of Government agents may involve a pattern or a series of violations over a short period of time, the damage remedy against the United States may be inadequate. And more important, as noted earlier, if federal agents unlawfully seize materials which are about to be published, the news organization or other person covered by the statute may wish to bring a suit in equity to recover the materials improperly seized. In such instances a damage remedy against the Government may be totally useless, while the equitable remedy under either the APA or H.R. 3486 would be meaningful.

For these and other reasons, it is important that private persons injured or aggrieved by conduct made unlawful by H.R. 3486 be permitted to sue federal officers and employees under the statute. Because *Rigsby*, *Cort*, *Cannon* and the *TAMA* cases make it clear that Congress does not have to give such rights expressly in the statute, we make it plain here that we do intend injured or aggrieved persons to have a claim for relief under H.R. 3486. In light of the need for such a remedy, the courts should permit private persons to initiate actions for legal or equitable relief.

Finally, it should be noted that Section 5 purports to preclude any person from invoking the exclusionary rule as a "remedy or sanction" for a violation of H.R. 3486. In all candor, this part of Section 5 was not discussed at the full Committee mark-up session. Section 5 was represented to the Committee as simply providing a damage remedy against the United States for violations of H.R. 3486. Focusing now on the potential sweep of Section 5, it is entirely possible that this provision could be interpreted as eliminating entirely the use of the exclusionary rule for violations of H.R. 3486.

Such an interpretation would be a reversal of landmark judicial and legislative decisions over the past 65 years. From *Weeks*⁶ to *Mapp*⁷ to Title III of the Omnibus Crime Control and Safe Streets Act of 1968⁸ (the wiretap statute), the Supreme Court and the Congress have moved together to broaden the protections for citizens and others against overstepping by law enforcement officials. For example, the wiretap statute passed by Congress in 1968 contains a very sweeping exclusionary rule which forbids the admissibility of any evidence "in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation" of Title III. 18 U.S.C. § 2514. It would be difficult to draft a broader exclusionary rule than that contained in Title III: it applies to

⁶ *Weeks v. United States*, 232 U.S. 383 (1914).

⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁸ 18 U.S.C. Sections 2510-2520.

every conceivable proceeding at the federal level, including hearings before congressional committees, and it applies to all proceedings at the state level as well.

The serious incursion Section 5 potentially makes into the exclusionary rule is not to be taken lightly. It must be remembered that H.R. 3486 is enacted to advance the highest principles of democracy: the protection of the values which undergird the First and Fourth Amendments. Not to provide the remedy of the exclusionary rule in that context would be to undermine significantly the effectiveness of the statute. Suppose, for example, the Government should once again, as it did in the *Ellsberg* case, prosecute a present or former federal employee for releasing information to the New York Times. Assume also that federal agents now seize evidence from *The Times* in violation of H.R. 3486 for use at the criminal trial of the federal employee. Based on that illegally obtained evidence, the Government then indicts the *New York Times* and its employees as co-conspirators. Under one reading of Section 5, the *Times* and its employees, as well as the original defendant, could not invoke the exclusionary rule to challenge the legality of the seizure. Under one reading of Section 5, they could only assert a damage remedy against the United States under the Tort Claims Act.

That broad reading of the "exclusionary rule" reference in Section 5 must be rejected categorically. On its face, this provision is clearly inconsistent with the APA: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703.⁹

Consequently, a person adversely affected or aggrieved by such agency action has the right to raise the legality of that conduct in a criminal proceeding.¹⁰ Neither H.R. 3486 nor any other statute can "supersede or modify" the APA unless "it does so expressly." 5 U.S.C. § 559 H.R. 3486 does not contain any language which meets that test of explicit congressional direction. Thus Section 5 cannot be read to preclude any person, in a civil or criminal enforcement proceeding, from challenging the legality of a seizure in violation of H.R. 3486.

The reference to the exclusionary rule in Section 5 does, however, impose some restrictions. It simply means that no claim for damages based on a violation of the exclusionary rule may be brought directly on the basis of the Fourth Amendment for conduct violative of H.R. 3486. In other words, H.R. 3486 does not overrule the *Zurcher*¹¹ case in the sense that the courts must now reinterpret the Fourth Amendment in accordance with the views of Congress. In this bill we say nothing about the proper interpretation of the Fourth Amendment. H.R. 3486 simply provides statutory rights and remedies for conduct found by the Court in *Zurcher* not to violate the Fourth Amendment. In short, the reference to the exclusionary rule in Section 5 precludes

⁹ As noted earlier, seizure of property is, "agency action" within the meaning of the APA. 5 U.S.C. Section 551 (10) (D) and (13).

¹⁰ Whether any particular defendant is a person "adversely affected or aggrieved" by agency action is a question of standing to be determined by looking both at the APA and at H.R. 3486. See *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

¹¹ *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

the assertion of Fourth Amendment claims for *Zurcher*-type conduct under the Federal Tort Claims Act.

Alternatively, if the reference to the exclusionary rule in Section 5 is read broadly, which it should not be, to preclude any person from invoking the exclusionary rule in a civil or criminal enforcement proceeding, then the Congress is obligated under the APA to provide a "prior, adequate, and exclusive opportunity for judicial review" of the challenged agency action. 5 USC section 703. Where allegedly unlawful conduct by Government agents is directly related to the enforcement proceeding, as it would be under H.R. 3486, the APA requires that the defendant be given an adequate opportunity prior to the enforcement proceeding to challenge the legality of that conduct. Indeed the right under the APA to attack the legality of government action in a pre-enforcement proceeding may well be rooted in the due process clause of the Fifth Amendment. See *Yakus v. United States*, 321 U.S. 414 (1944).¹²

These serious questions of constitutional and statutory interpretation may be avoided by viewing the private right of action under H.R. 3486, discussed earlier, as the prior and adequate opportunity to challenge the legality of the search and seizure required by 5 USC section 703. Thus if a defendant in a civil or criminal enforcement proceeding wishes to challenge the legality of the federal agents conduct under H.R. 3486, the defendant may do so by instituting a civil action and securing a judgment prior to the commencement of the trial in the enforcement proceeding.¹³ Ordinarily a defendant may not, in a collateral proceeding challenge the admissibility of evidence simply because the defendant may do so in the course of the enforcement proceeding. See *Stefanelli v. Minard*, 342 U.S. 117 (1951). But if Section 5 is interpreted to preclude that opportunity, then the defendant must, under the APA and the due process clause, have a forum for challenging the violation of H.R. 3486 in advance of the trial.

In summary then the language in Section 5 regarding the exclusionary rule should be narrowly construed, in the manner suggested earlier, to avoid these difficult constitutional and statutory questions. But if it is interpreted to preclude challenging the admissibility of evidence obtained in violation of H.R. 3486 during the enforcement proceeding, then the defendant should be permitted to utilize the private right of action remedy authorized by H.R. 3486 to bring a civil suit and secure a judgment on the legal questions prior to the opening day of trial. This is yet another reason why H.R. 3486 must be interpreted to authorize a private right of action against the offending officials.

In discussing the scope of H.R. 3486, one question runs through the entire debate: who may enforce its salutary provisions? This issue is sometimes referred to as "standing", a matter controlled in part by

¹² Because of the serious constitutional and statutory questions which would be raised by a broad reading of the Section 5 language relating to the exclusionary rule, the phrase should be read narrowly as suggested above.

¹³ In rare cases the defendant may not learn that the Government has violated H.R. 3486 until the trial begins. In such instances, the defendant should be permitted to object to the admissibility of the illegally seized evidence. Alternatively, H.R. 3486 could be read as imposing an affirmative obligation on the Government to disclose to the defendant that it plans to introduce or has in its files evidence secured involuntarily from persons protected by H.R. 3486. See *Brady v. Maryland*, 373 U.S. 83 (1963).

the "case or controversy" limitation of Article III.¹⁴ H.R. 3486 should be construed liberally to give a wide range of interested persons and parties the right to challenge violations of the statute. The courts should apply a broad concept of persons adversely affected, injured, or aggrieved. See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *United States v. SCRAP*, 412 U.S. 669 (1973). Standing under this statute should be as broad as Article III permits because it is a remedial measure to enforce important First and Fourth Amendment values. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). This broad notion of standing should apply equally to federal and state courts and equally whether the challenge to the conduct violative of H.R. 3486 arises in a civil action instituted by the person adversely affected or aggrieved, or in a civil or criminal enforcement proceeding where the defendant may wish to raise it.¹⁵

ROBERT F. DRINAN.

¹⁴ Article III standing limitations under H.R. 3486 would not be implicated if the private action is brought in state court. But since federal officials may freely remove such suits to federal court under 28 U.S.C. 1442, that possibility would almost never arise in the context of a private civil action. However, if federal officials were to seize evidence in violation of H.R. 3486 and turn it over to state or local prosecutors, then the question of its application in state court might arise.

¹⁵ Because H.R. 3486 should be liberally construed to confer standing as broadly as Art. III permits, the courts should not impose "prudential" limitations on standing which might be appropriate where no act of Congress is involved. See *Warth v. Seidin*, 422 U.S. 490 (1975); *Rakas v. Illinois*, 439 U.S. 128 (1978).

ADDITIONAL AND DIFFERING VIEWS OF HON.
GEORGE E. DANIELSON

Except as otherwise set forth here, I am in agreement with the views of Mr. Hyde.

I oppose the purposes of this bill, H.R. 3486, in their entirety. I believe that there should be no special exceptions from the coverage of the Fourth Amendment for those persons known as "the press", nor for anyone else.

The bill would exempt from the reach of search warrants materials in the possession of persons who intend to disseminate the material to the public in some form of public communication, whatever that may be. There are certain limited exceptions.

In my opinion the Congress would be making a gross and unacceptable error if it were to create an elite class of persons, be they press or anyone else, who would enjoy a privileged status under our laws and the Constitution. It is fundamental in our system of justice that no one should be above the law and the Constitution. The Judiciary Committee itself made that point eminently clear when it voted Articles of Impeachment against former President Nixon. And the Supreme Court of the United States clearly did the same in its decision in the *United States v. Nixon*, 418 U.S. 683 (1974).

Those who fear that law enforcement has the right, under present law, to conduct unreasonable and unwarranted excursions into the private papers of the people could well read again the clear and exacting standards for searches which are set forth in the Fourth Amendment to the Constitution, which provides:

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,
- And no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,
- And particularly describing the place to be searched, and the persons or things to be seized.

These standards are high. They insure that the security of the people in their fundamental area of privacy shall not be violated, and that no search warrant can issue unless:

1. The proposed search is reasonable;
2. There is probable cause;
3. Supported by oath or affirmation;
4. Describing with particularity;
5. The place to be searched: and
6. The persons or things to be seized.

These are very high standards. They have stood the test of time and trial since 1791; they have been briefed, argued, debated and refined in

numerous decisions of our Courts; and they have provided the American people with a degree of security in their persons, homes, papers and effects that has never been equaled in any society.

Further, there are other safeguards which prevent the indiscriminate issuance of search warrants. For instance, we must remember that search warrants are not issued by the law enforcement authorities themselves. Those officers must go to court or a magistrate and apply for the issuance of the warrant. That application must reflect the probable cause and other particulars set forth in the Fourth Amendment, and it must be supported by oath or affirmation before the court will issue the warrant.

The special elite corps which the bill would protect in its Section 2 is indefinable. I submit that very nearly anyone or everyone can reasonably contend that he plans to disseminate the documentary material in his possession to the public in some form of public communication; either now or later. This would certainly apply to anyone who has the intent of ever distributing to the public a newsletter, a mimeographed flyer, some gossip on a radio talk show, or a handbill, as well as to a traditional newspaper.

I respectfully submit that this is bad legislation, and it should be soundly defeated. Its great evils are that it creates an elite corps of persons who would be above the law—a classification to which a responsible and professional newsman should not subscribe; it creates sanctuaries for the concealment of evidence of crime; and it would impose severe and added burdens on law enforcement at a time when the public is crying out for more and more effective enforcement of our laws.

GEORGE E. DANIELSON.

SUPPLEMENTAL VIEWS OF MESSRS. HYDE, LUNGREN,
SENSENBRENNER, AND VOLKMER

This bill was introduced for the purpose of responding to the Supreme Court's holding two years ago in *Zurcher v. Stanford Daily* 436 U.S. 597 (1978). In that decision, which resulted in a 5-4 split, the Court held that the press was not exempt from standard search and seizure procedures as permitted by the Fourth Amendment. Its holding was entirely consistent with its earlier unwillingness to protect reporters from having to divulge their sources pursuant to grand jury investigations. *Branzburg v. Hayes*, 408 U.S. 665 (1972). Nevertheless, we feel the press should be prospectively protected from searches which may well have a chilling effect on its very fundamental responsibility to inform the public.

Our apprehension, therefore, flows not from the motivations which created this bill in the first place, but rather from an effort which has been made in full Committee to broaden its coverage and trespass into what we believe to be dangerous and uncharted waters.

Section 2 of the bill spells out the statutory exception this legislation provides for the Press. Very simply, it creates a "subpoena first" rule which demands that a subpoena must be sought ahead of a search warrant where documentary evidence held by the Press is concerned. If any one of several factors are present, including "reason to believe" that the evidence will be destroyed, a warrant may issue.

Section 3 extends similar protection to "Innocent Third Parties," whoever they are. As we have said, we are not particularly worried about the passage of this bill with an exception to search and seizure law for the Press because confidential news sources must feel that they can come forward without fear of having their names accidentally revealed to law enforcement officials. That security is the life's blood of a free society. Furthermore, there is no record of Federal abuse in this area. Section 3, however, is an altogether different matter. Third parties, whether innocent or not, are very often the subject of seizures conducted pursuant to search warrants. Passage of this section will cause a major law enforcement problem and create a sanctuary where incriminating evidence can remain safe and untouched until notification is given by a subpoena duces tecum.

We should all keep in mind that the Fourth Amendment guarantees for all of us, including third parties, the right to be "secure in [our] persons, houses, papers, and effects, against unreasonable searches and seizures, . . ." Privacy therefore, is the principal consideration and search warrants may not issue unless, as provided in clause two of the Amendment, "probable cause" is present. This section will raise that standard to require an additional "reason to believe." And what is "reason to believe"? No one knows. The record

shows no precedent for it and even the Members of the Committee are unsure of its meaning. So, why are we preparing to enact it into law?

The proponents of H.R. 3486, as originally introduced, included the Department of Justice. When section 3 was added in subcommittee, the Department's position radically changed. On March 31, 1980, Attorney General Civiletti wrote Chairman Rodino, with copies to each of us, that:

[B]y shifting the focus of the warrant procedure to an examination of the motives and intent of third parties who hold evidence of crimes [you] will in effect require further intrusions into the privacy of innocent persons which heretofore have been unnecessary. In sum, section 3... will... create severe law enforcement disabilities.

Proponents of section 3 contend that if a law enforcement officer has "reason to believe" that evidence will be destroyed or that serious bodily injury or death will result from a delay, he can get a search warrant as before. Otherwise, he must demand the evidence through a subpoena. The plain fact is, however, that the Constitution demands only a showing of probable cause and that this bill would raise that standard without a showing that it is indeed a prudent and necessary thing to do. Basic investigative tools should not be so easily discarded, especially without documentation of the new standard's true meaning and extensive abuse requiring protective legislation. Actually, to determine whether or not "reason to believe" is present, an investigation by the FBI of the alleged "innocent third party" would be required. This can do further violence to the privacy in which we assert such a protective interest.

When this bill reaches the House floor, an amendment will be offered to eliminate section 3. We believe it is a dangerous and ill-conceived provision, and we urge our colleagues to read it carefully lest you find that you are criticized for having unwittingly created Organized Crime's dream: a statutorily protected sanctuary in which to conceal incriminating evidence from the probing eyes of law enforcement.

HENRY J. HYDE.
DANIEL E. LUNGREN.
F. JAMES SENSENBRENNER.
HAROLD L. VOLKMER.

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